United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1853

To be argued by
RICHARD H. SOMMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

SHINKO BOEKI CO., LTD.,

Plaintiff-Appellant,

against

S.S. "PIONEER MOON", her engines, boilers, etc., and UNITED STATES LINES, INC.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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The Issue Presented for Review

The issue is whether an ocean carrier has the benefit of the statutory package limitation under the Carriage of Goods by Sea Act of the United States, 46 U.S.C. 1300 et seq. for a container loaded by the shipper, designated as a "package" by the shipper, utilized as a package and defined as a package in the contract of carriage.

Statement of the Case

Plaintiff recovered $5,500.00 plus interest and costs and appeals the final judgment of an admiralty action in the Southern District of New York (Frankel, *J.*) which limited plaintiff's recovery to $500.00 per package in accordance with the statutory and contractual limitations of liability.

The Facts

Appellee, United States Lines, Inc., an American flag ocean carrier, and owner of the S.S. PIONEER MOON, carried 24 tanks, said to contain latex to Japan from Baltimore. The facts are not in dispute and liability for the loss was conceded.

On November 25, 1968 the head office of the Firestone International Company as a shipper, requested their New York office to book "X" number of *tanks* aboard a vessel departing for Japan in early December 1968. (p. 25)* Mr. John D. Grimes of Firestone, New York, telephoned United States Lines, Inc., (hereinafter known as "USL") requesting 24 lift-on, lift-off *tanks* be made available to Firestone for shipment of latex and booked the 24 *tanks* aboard the SS PIONEER MOON out of the Port of Baltimore. (p. 26) At no time did the shipper request a bulk shipment i.e. into the vessel's holds or deep tanks.

The 24 tanks, owned by USL, were picked up by Firestone, taken to Firestone facility in the Port of Baltimore, where Firestone filled the *tanks* with latex, weighed and delivered tanks with latex to USL's facilities. (p. 22) The tanks were loaded on board the PIONEER MOON on December 13, 1968.

Firestone, the shipper, prepared bill of lading No. 18 on USL's form and Firestone, the shipper and owner of the goods, typed the face of the bill of lading. (pp. 28, 29) That bill of lading (p. 39) states in part:

* References are to pages in the Joint Appendix.

"PARTICULARS FURNISHED BY SHIPPER

NO. OF PKGS.	DESCRIPTION OF PKGS. & GOODS
7	LIFT ON LIFT OFF TANKS SYNTHETIC LATEX * * *
7	LIFT ON LIFT OFF TANKS SYNTHETIC LATEX * * *
7	LIFT ON LIFT OFF TANKS SYNTHETIC LATEX * * *
3	LIFT ON LIFT OFF TANKS SYNTHETIC LATEX * * *"

The designation as to the number of packages was made by the shipper—not the carrier. The bill of lading also states:

"Said to weigh 359,179 pounds."

The PIONEER MOON arrived at Yokohama on January 14, 1969 and discharged the tanks, 11 of which were damaged with the contents lost.

On January 17, 1969 Shinko Boeki Co., Ltd., the appellant, sent a notice of claim to USL entitled "24 Tanks Synthetic Latex ***" (p. 42). This letter stated that "11 Tanks Empty i.e. heavy or slightly dented and holed on sides &/or at bottom" and "2 Tanks slightly dented and contents unknown." Shinko wrote to Firestone on February 1, 1969 and entitled its letter "Poor Arrival Condition of Lift-on/Lift-Off Tanks per S/S Pioneer Moon." (p. 43) This letter stated that 11 tanks out of 34 were found entirely empty.

A subsequent claim by Shinko dated February 1, 1969 (p. 45) was captioned "11 Lift-on/Lift-off Tanks Synthetic Latices [sic] FR-S 223 and FR-S 2004 per s/s 'Pioneer Moon' ex. B/L No. 18 dd. Baltimore December 13, 1968."

This letter included a Debit Note (p. 46) to USL which claimed

"Shortage per 11 empty tanks out of 17 tanks."

The insured value of the 17 tanks "as per attached insurance certificates" was $42,500 and Shinko in computing the value of the cargo short shows the following equation:

"$42,500 x $\frac{11}{17}$ ..... $27,500"

Again on March 18, 1969 Shinko wrote to USL referring to the damages to the *tanks* stored in No. 4 Hatch. (p. 44)

Since the decisions and opinions of this Court have laid great emphasis on whether the parties designated pieces, units etc., as "packages," appellee emphasizes the facts that appellant (shipper, consignee, cargo insurer) constantly referred to the shipment in terms of tanks and *not* bulk cargo.

Moreover the Complaint alleges damage or loss to 24 *tanks* and the subrogation receipt which appellant signed for its underwriter quantifies the cargo as "7 lift" and describes the goods as "tank."

The contract of carriage included among its terms:

> "It is agreed and understood that the meaning of the word "package" includes *containers,* [emphasis added] vans, trailers, palletized units, animals and all pieces, articles or things of any description whatsoever except goods shipped in bulk.
>
> * * * *
>
> In the event of any loss of or damage to goods exceeding in actual value $500 per package lawful money of the United States, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per customary freight unit as the case may be, and the carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, unless the nature of the goods and a higher value shall be declared by the shipper in writing before shipment and inserted in this bill of lading. * * * * (p. 40)

The shipper did not insert a higher value in the bill of lading. (p. 34 ll. 12-14) Firestone also had a working knowledge of the terms of the bill of lading (p. 32 ll. 8-9) and had the tariffs available (p. 32 l. 15) Tariff no. 24, F.M.C. 2 which is applicable to this movement (p. 47) in the section pertaining to, as here, "SHIPPER PACKED CONTAINERS" i.e. tanks filled by the shipper, states:

> "(11) *Vessel's Liability.* Each container, including its contents, is a single package and vessel's liability is limited to $500.00 with respect to each container packed by shippers. For ad valorem cargo, when shipper declares a valuation for the contents of a container in excess of $500.00 and additional freight paid, the declared valuation when proven will be considered vessel's liability."

Finally, the shipper testified with respect to shipments of latex:

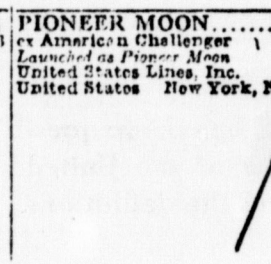
> "Q. This liquid latex, I assume you make a fair number of shipments of this commodity? A. Yes, we do.
>
> Q. Is it ever shipped other than in tanks? A. We have shipped it in 55 gallon drums and we also shipped it in deep well tanks and tank trailers.
>
> Q. I am talking about ocean transportation? A. Yes, ocean transportation.

Q. What do you mean by a deep well tank? A. A given hatch that has been prepared, cleaned and so forth, port or starboard of a vessel.

Q. That would be a bulk shipment? A. That would be a bulk shipment.

Q. Where it is pumped directly into the vessel and then pumped out of the vessel at the other end? A. That's correct." (p. 38 ll. 2-5)

This testimony highlights the difference between *containers* such as a drum or a tank[1] and *bulk* shipments. Admittedly a drum is a package. The *deep tanks*[2] of a vessel are not containers. We all know that there are mammoth bulk vessels that can carry more than a quarter million *tons* of liquid. Also there are vessels such as the PIONEER MOON which can carry liquid cargo in bulk. The official listing of the PIONEER MOON in Record, American Bureau of Shipping, 1968 appears on the opposite page.



620934
283,263
WJJX

PIONEER MOON.....
ex American Challenger
Launched as Pioneer Moon
United States Lines, Inc.
United States New York, N

The PIONEER
feet and a capaci
of 51 feet 9 inch
520 *tons. Latex* c
by hose into these

[1] See illustration attached as "A".

[2] See illustration attached as "B".

.... N.Y.	Gen Car AP 252 DTa 90' (Cargo) 831 DB 39'3" 1987 DTf 51'9" (Cargo) 520 FP 108	Steel; 2 Dks 3rd Dk at ends Metal Arc Welded (Gunwale Angle, 2 Side & 1 Btm Shell Seams each side riveted) Trans Frmg Dk & Sides Long Frmg Btm 8 WT to Fbd Dk 1 WT to 3rd Dk 10 Ha;SC;42'6"x23' 6 Ho 75' HalCarSys 44M Ins	Oil 3380 tons Rad Tel Rad Phone Rad DF DS;GC Radar Loran C-43(S)	522'11½" 75' 42'8½" 531' 75.2' 29.3' F93' Dft 31'7" 666M Fbd 11'4½" Dr 0"	11164 6683 8237 4827 13583 21053	Newport News S.B. & D.D. Co. 856 Newport News, Va. 8-1962 Westinghouse Electric Corp. 8-1962 Foster-Wheeler Corp. 8-1962	2 Cyl Stm Turb SHP 21600;DR Gears 2 WTB;HS 34110 DSV 700 Lbs;SHSV 630 Lbs FD;SH SDP;CLA	✠A1(E) SS No. 1 3-67 AS 3-68;Dkd 6-68 ✠AMS MS 3-67;BS 3-68 An MS 3-68 TS Den 6-68 ✠RMC SS 3-68

MOON has two deep tanks, one of 90
ity of 831 *tons*, located aft,—the other
es located forward, with a capacity of
or other liquid cargo can be pumped in
tanks.

This appeal involves portable lift on, lift off tanks stowed in various hatches below deck (p. 20) along with boxes, drums and other package cargo.

POINT I

The Court below correctly held that the tanks in question were packages within the meaning of the United States Carriage of Goods by Sea Act and the definitions of the contract of carriage.

(A) History and present state of the Law

Lord Diplock* has pointed out that in the world of maritime commerce ". . . It is not the actual sinner who pays for the consequence of his sin. But, in the Court room, as at the diplomatic conference table, we talk and tend to think as if the contest involved a moral conflict about one human being's duty to his neighbor, instead of an allocation of liability between cargo insurers and protection and indemnity (P. and I.) insurers of a loss which has occurred through the fault of neither" 1 *Journal of Maritime Law and Commerce,* 525 (1970) hereinafter cited as J.Mar.L.&C.

The litigation here arises in the typical context of a subrogated cargo-underwriter against a carrier's P. and I. insurer. In looking toward a solution of questions like those here presented, Lord Diplock concluded with the hope that ". . . any proposal to solve the anomaly arising from the package limitation in the Hague Rules . . . will be based upon the practical economics of insurance and not on any high moral grounds." In his view, . . . "it is more practical and economical from the point of view of insurance to spread the risk to the cargo in excess of a fixed limit among

* Kenneth Diplock is an eminent jurist and a member of the House of Lords, Great Britain, a Lord of Appeal in Ordinary and a delegate to recent international conferences considering limitation provisions in International Maritime Conventions.

a number of cargo insurers than to concentrate it in the carrier's P. and I. insurer" 1 J. Mar. L. & C. 528-29, 536 (1970.)

Likewise in an article published earlier this year, entitled The Container and the Package Limitation—The Search for Predictability, 4 *Journal of Maritime Law and Commerce,* 251, January 1974, the economics are discussed beginning at page 277:

> "The reason the cost of declaring full value in the bill of lading exceeds the cost of obtaining full coverage from cargo underwriters has to do with the nature of the shipowner's P. & I. policy which is rated upon a maximum liability. Cargo insurance spreads the cost among many cargo interests in direct relation to the nature of their risk, based upon known values whereas the cost of P. & I. insurance is spread over freight rates on an average basis, with the accumulated burden of loss falling on one policy based on an estimate of maximum exposure. The shipper knows the value of his cargo and can limit the coverage he buys to that value. The carrier can only guess and tends to buy more than enough."

* * * * *

Continuing at page 278:

> "Obviously, each shipper is in a much better position to obtain the coverage he wants. Arguments that would concentrate both liability and insurance function on the ocean carrier are 'erroneous and misleading', according to Carl E. McDowell, executive vice presdient of the American Institute of Marine Underwriters. The Brussels Protocol, signed in 1968, substituted a limit of $662 or 90 cents per pound, whichever is higher, in place of the $500 package limitation. On this basis, a

ship carrying 1,080 20-foot containers averaging 12 long tons each would require a P. & I. coverage of $43,000,000 by the shipowner, and on the basis of $3.50 per pound, a limit being urged by some U.S. Government officials, the insurance required would amount to $170,000,000 per voyage. The impact on freight would be dramatic, even if such coverage could be purchased, and the cargo owner would be forced to purchase such insurance since the cost is built into the freight rate. Moreover, carrier's liability does not cover all the risks, and the shipper would still have to buy some insurance of his own. The push for higher carrier liability is short-sighted. As Mr. McDowell points out, 'Cargo insurance spreads the premium cost of insurance among cargo interests in direct relation to the nature of their risks, where the cost (or insurance premium) of liability is spread over freight rates on an average basis, with the burden of loss payments falling on one policy.' "

Finally at page 279:

> "It is submitted that the approach of *Standard Electrica* and of the trial court in *Kulmerland* was better, since it can usually be easily determined whether the shipper chose to use the container and whether the description in the bill of lading treats the container as a package. In fact, the pains of litigation and the search for predictability would both be ended if the courts left the parties alone to decide what they consider to be a 'package' for the purpose of their contract. As has been shown, the 'package' problem relates primarily to insurance and to the ability of the parties to allocate beforehand the risks that each side is to cover. Insurance experience indicates that it is cheaper for the shipper to buy his own coverage than to declare a full value and pay added freight."

Whether a monetary limitation of liability of $500 (or $662 as per the new Convention) for a container is fair or adequate is a question of policy which must be determined in the context of the economics of the shipping and insurance business. In *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische, etc.*, 375 F.2d 943 (2 Cir. 1967) at 946, the Court pointed out that: ". . . If through the passage of time this statutory limitation has become inadequate and its application inequitable, a revision must come from Congress, it should not come from the courts." The Court pointed out also that COGSA [§4(5)] "cast upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wished to impose a higher liability on the carrier."

In *Aluminios Pozuelo Ltd.* v. *S.S. NAVIGATOR*, 407 F.2d 152 (2d Cir. 1968), in which this Court held a skidded toggle press to be a "Brobdingnagian package" with a $500 limitation, Judge Moore said:

> "If shippers find the $500 per package limitation outdated because of inflationary trends and technological developments, the statute provides that they can obtain at their option full coverage merely by declaring the nature and value of the goods in the bill of lading and, where necessary, by paying a higher tariff. On the other hand, if they are reluctant to pay the higher charge and chose instead to gamble on safe delivery, they cannot argue later that the statute is inequitable. *Moreover, any revision must come from Congress and not from the Court.*" (Emphasis added).

In the present case, the appellant was conversant with the applicable tariff provisions pursuant to which it could

have shipped the container (tank) with full liability on the carrier. It deliberately chose not to ship on those terms in order to have the benefit of a lesser freight rate.

What constitutes a "package" has long been defined at common law, in congressional hearings and in decisions of this Court. Neither size nor value nor shape is a factor.

The early English decision of *Whaite* v. *The Lancashire and Yorkshire Railway Company*, L.R. 9 Ex. 67 (1874) is an illustration of how broad the definition of a package may be in the context of limitation statutes. Plaintiff shipped a wagon with wooden sides without a top. In this wagon, among other things, were several valuable oil paintings. The train on which the wagon was carried was in a collision and the contents of the wagon were damaged. The Act which governed contained a limitation of £10 per package. The three judges decided as follows:

> "Bramwell, B. I think this wagon with its contents was a 'package' within the meaning of the Act Although one would not commonly describe it in that way, yet, looking at the object and purpose of the Act, I think we are not entitled but compelled to say that it was a 'package or parcel' within the section.
>
> "Cleasby, B. *It would be absurd to say that the wagon was too large to be a package; plainly, size cannot be a criterion.*
>
> "Pollock, B. I think that this was a package, if not a parcel. The plaintiff says, 'I packed the goods in my fourwheeled wagon, which had wooden sides, but no top,' which is much as if a man should say, 'I packed my silver forks in a wooden box, but I could not put a top on it, because it was too full.' This was clearly a parcel or package within the meaning of the Act; and the plaintiff, not having declared the value and nature of the contents, cannot recover."

At the time Congress was considering the enactment of Cogsa, it had before it the knowledge that items of large size and weight would be considered packages under the Carriage of Goods by Sea Act. See, *e.g.*, Hearings on a bill relating to Carriage of Goods by Sea, before the Committee on Commerce, United States Senate, 74th Congress, 1st Sess. 38-39 (May 10, 1935).

> "The Chairman. Can you make reference, Colonel Barber, to that page of your memorandum, so that the record will show it? I am anxious only that the record should be clear on it, because you have to bear in mind most of us are laymen so far as shipping terms are concerned, and it would be well if we knew the reasons for those things.
>
> "Mr. Barber. There is a brief supporting argument on that . . .
>
> "Limitation of Liability. The Harter Act makes no direct reference to valuation clauses. Limitation of liability, however, is permitted, provided it falls short of relieving the carrier from all responsibility for loss or damage arising from the negligence of himself or his servants. Hence it was assumed in a case before the United States Supreme Court that a liability limited to $100 on a car worth $3900 was not improper. The White Bill imposes a liability of $500 per package or customary freight unit; with the parties free to agree upon a higher figure if they wish."

And Hearings before the Sub-Committee of the Senate Committee of Foreign Relations, 70th Cong., 1st Sess. 9-10 (December 22, 1927):

> "Senator Edge: I would like to be assured on that. You say that they can drop overboard a Rolls-Royce car and hand me $500 in full amount of damages.

"Mr. Haight: You can get just what the bill of lading says they have to pay you, and no more."

The question always was who should bear the risk of loss in excess of the agreed limitation and on what terms?

The following excerpt from the Report of the Hearing before the House Committee on the Merchant Marine and Fisheries, 71st Cong., 2d Sess. 34, 3-5, 10 (March 1930), exemplifies what was before Congress:

"Mr. Davis: Why should not they be liable for the full value of the package? $500 might be sufficient in most cases, but suppose there is a package worth $50,000, what would $500 recovery amount to?

"Mr. Haight: All you have to do is go to the carrier and say, 'this package is worth $50,000'.

"Mr. Bland: If he declares the value, they are liable?

"Mr. Haight: All he has to do is to declare the value and pay a higher freight rate.

"Mr. Sloan: The provision for that thing is right here."

The Act and the bill of lading both provided that the value of the goods, among other things, be inserted in the bill of lading as a condition of recovery in excess of the limitation. This requirement holds true for goods that are packaged as well as for any item shipped. The plaintiff preferred to forego full carrier responsibility in order to obtain the benefit of a lesser freight rate.

One of the decisions referred to above was *Reid* v. *Fargo*, 241 U.S. 544 (1916), involving damage to a boxed automobile. The bill of lading issued by the steamship company limited liability to $100.00 a package. The Supreme Court of the United States decided that $100.00 (the amount to which the steamship company's liability

was limited in the bill of lading) was the amount that could be recovered for the boxed automobile.

Thus, prior to the passage of the Carriage of Goods by Sea Act, large wagons placed on railroad cars (similar to containers on vessels) and automobiles in boxes, were considered packages subject to strict limitation. Congress then limited an ocean carrier's liability to $500 per package.

The Act passed by Congress in 1936 differs slightly from the 1924 Convention and the other Acts of the world maritime nations. The section with which we are concerned reads:

"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be conclusive on the carrier." 46 U.S.C. section 1304.

Since the passage of the Act there have been many many decisions of the Courts as to what constitutes a package. One of these is *Mitsubishi Int'l. Corp.* v. *S.S. Palmetto State*, 311 F.2d 382 (2d Cir. 1962). The container in that case was made of wood instead of metal. It contained a roll of steel weighing 32½ tons. The box was 16′ x 6′ x 5′. In principle, that case is on all fours with the matter at bar. This court said:

". . . In Isbrandtsen where damage was suffered by ten locomotives and tenders, the Court held that the unit for computing freight charges was a locomotive and tender and, therefore limited liability to $5,000, the same result that would have been reached had the locomotive been in fact packaged. The policy behind the statute as interpreted in that case can hardly be said to be merely to prevent liability for excessive claims based on the undisclosed value of articles shipped at sea.

"If the libellant had wished to except this $500 limitation, it need only have inserted in the bill of lading the true value of the cargo and paid a higher freight rate to secure the greater coverage. In failing to do so in this case, libellant, by virtue of this statutory provision, took the risk of a greater loss on itself and cannot now be heard to complain."

In *Standard Electrica S.A. Hamburg Sud,* 375 F.2d 943 (2d Cir. 1967), a pallet, to which were strapped six cardboard cartons, each containing 40 television tuners, was held to constitute a single package by this court limiting recovery under the Carriage of Goods by Sea Act. In the course of its opinion, the court said at page 945:

"No doubt the drafters had in mind a unit that would be fairly uniform and predictable in size, and one that would provide a common sense standard so that the parties could easily ascertain at the time of contract when additional coverage was needed, place the risk of additional loss upon one or the other, and thus avoid the pains of litigation.

"Few, if any, in 1936 could have foreseen the change in the optimum size of shipment units that has arisen as the result of technological advances in the transportation industry. As both parties recognize, it is

now common for carriers to receive cargo from their shippers in a palletized form or 'containerized' form. In some instances an entire trailer may be uncoupled from its tractor-truck on the pier and placed aboard the carrier. . . ." 375 F.2d 943 (2d Cir. 1967)

The court rejected the contentions of cargo that the COGSA limitations must be strictly construed. The court pointed out that these contentions overloaded (1) the characterizations of the parties, (2) that it was the shipper and not the carrier who chose the method of shipping, (3) that Section 4(5) of Cogsa gave the shipper an option of obtaining full carrier responsibility and (4) that it is not important that the drafters of COGSA did not foresee the precise application of "package".

It is to be noted that in *Encyclopedia Britannica* v. *Hong Kong Producer,* 422 F.2d (2d Cir. 1969) Judge Hays said, in dissent, at page 20: "Furthermore, it seems to me that each container as a unit is the package to which the $500 limitation should be applied." The majority did not reach the question and so did not consider it.

As Judge Hays said:

"Here the containers were delivered to the carrier by the shipper's agent already packed with the individual carton of encyclopedias. On the bill of lading delivered to the agent by the carrier upon receipt of the containers, the 'No. of Pkgs.' and the 'Description of Packages and Goods' were given as, e.g., '(1) One metal container No. UCC-5330 said to contain: 536 ctns bound books.' The shipper made no objection to this description. I *would thus hold that the parties intended each individual container to be considered as the functional packing unit, that considering the containers as the packages promotes uniformity and pre-*

dictability, and, accordingly, that the $500 per package limitation applies to the containers." (422 F.2d at 20 (Emphasis added).)

And by 1973 the same Court of Appeals adopted a functional packing unit as the test in holding that a container with 4200 pounds of cargo, of a size *larger* than the container tank in this case, to be a *package* with a $500 limitation. *Royal Typewriter* v. *M/V Kulmerland,* 483 F.2d 645 (2d Cir. 1973). This case, and another, will be discussed more fully below.

In *Nichimen Co.* v. *M/V Farland,* 462 F.2d 319 (2d Cir. 1972) steel coils, each weighing much more than a tank or container filled with latex were held to be packages. Similarly, many Courts have had little difficulty in the last few years in finding various containers and objects to be "packages" with a limitation of $500 under the provisions of COGSA. *Lucchese* v. *Malabe Shipping Co., Inc.,* 351 F. Supp. 588 (D.P.R. 1973)—a trailer of household goods; *United Purveyors, Inc.* v. *M/V New Yorker,* 250 F. Supp. 102 (S.D. Fla.)—a refrigerated trailer with over 33,000 pounds of frozen fish; *Companhia Hidro* v. *S.S. Loide Honduras* (368 F. Supp. 289, Judge Ward, S.D.N.Y. 1974)—unboxed circuit breaker; and *Truck Insurance Exchange* v. *American Export Freight, Inc.,* 1972 A.M.C. 2509 (not otherwise reported)—a twenty (20) foot container. *Rosenbruch* v. *American Export Isbrandtsen,* 357 F. Supp. 982 (S.D. N.Y. 1973)—a 40 foot by 8 foot by 8 foot *container* ". . . is a package for the purposes of §4(5) of COGSA, 46 U.S.C. §1304(5)" (Judge Tyler); and *Sperry Rand Corp.* v. *Norddeutscher Lloyd,* 1973 A.M.C. 1392 (not otherwise reported —Judge Lumbard, sitting by designation)—a container 8 feet by 5 feet by 6 feet " . . . deemed a 'package' for purposes of the $500 package limitation."

We submit that the decisions of this Circuit and the various Districts, including distinguished Judges of this District, have clearly held that containers *filled by the shipper,* as well as other objects, are packages under COGSA and that carriers are entitled to a limitation of $500 per package. Clearly in this case each of the tanks constitute a package under the COGSA and the bill of lading.

(B) The Intent of the Parties

The cargo booked and to be transported was "X" number of tanks. It was the intent of all parties involved that tanks were to be transported. The tanks are obviously containers.

The containers were booked by the shipper, Firestone, and were filled by the shipper with latex. The bill of lading was prepared by Firestone who typed the number of *packages* of 24 lift on, lift off *tanks.* United States Lines agreed to transport 24 tanks said to contain latex from Baltimore to Yokohama.

The shipment was consigned to the appellant, who received 24 tanks of which 11 were empty on delivery. The claim letters and correspondence of Shinko to United States Lines and to the shipper Firestone always referred to tanks and in particular to the 11 empty tanks. The debit note of Shinko attached to the formal claim letter of February 1, 1972 was computed on the individual *value* of each *tank,* then multiplying that value *for each tank* by the 11 empty tanks. Not the value or weight of latex. Even the subrogation receipt signed by Shinko after payment of its claim by the underwriters stated that there were 11 empty tanks at a total value of $27,500.

There is no doubt that the intent of all parties directly or indirectly concerned in the movement of the 24 tanks or containers under bill of lading 18 intended that 24 tanks

or containers of latex were to be moved not a number of pounds or gallons of latex. Clearly this was *not* a bulk shipment.

The case on which appellant relies and cites as its leading (and only) authority is *The Bill,* 55 F.Supp. 780 (D. Md. 1944). That court had before it an entirely different matter in which oil had been pumped directly into the deep tank of the vessel to a *depth* of 20 feet. This is entirely different than the lift on, lift off tanks which are more akin to drums. The essential difference is that in *The Bill* the shipment was in bulk and so described in the bill of lading.

The Court said:

> "The oil was shipped in bulk and not in drums *or other packages,* and was contained in about equal quantities in the two deep tanks of the ship and practically filled both of them. All this is fully described in the original opinion in the case." p. 781 (emphasis added)

More importantly the bill of lading recited that the oil was *in bulk.* We quote again from page 781 of the opinion:

> "Nor was there any specific valuation of the goods inserted in the bill of lading which recited the receipt of '385,000 kilos of Oiticica oil *in bulk*' and which also specified that the freight charges on delivery were to be at the rate of $22 per 1,000 kilos." (emphasis added)

Not so here!

The Court in *The Bill* had a situation where bulk cargo was poured directly into the ship without any drums, tanks, containers or other packaging. More significantly, the bill of lading in *The Bill* stated *"in bulk."* In contrast, we ask the Court to compare the bill of lading in this case, Exhibit B, with the bill of lading reproduced at pages 986 and 987 of 357 F.Supp. That case *Peter Rosenbruch* v. *American*

Export Isbrandtsen Lines, Inc., 357 F. Supp. 982, (S.D.N.Y. 1973) is certainly more in point than *The Bill.* The Court decided that a container with measurements of 40′ x 8′ x 8′ was a package and the carrier's liability for loss of the cargo in the container was limited to $500. Similar to the facts in the case before this Court, the container was owned by the carrier and that container was requested by the shipper in order to load its goods into it. The shipper loaded the goods and the shipper's agent prepared the bill of lading which stated on the face under the column "number of cont. or other pkgs." the number "1". The words "shippers load and count" were stamped in block letters under the typed in description of the goods to be transported.

In *Rosenbruch* the Court disposed of the question as follows:

> "Ownership or possession, in and of itself, cannot be dispositive of this case. It, along with the entire record, must be considered, and inferences drawn as to the knowledge of the shipper and carrier and the mutual understanding of the parties."

The Court further states that other factors must be considered:

> "Specifically, uniformity of result and simplicity of application."
>
> • • • • •
>
> "The issue can first be narrowed by pointing out that it is solely with a container holding the goods of a single shipper that this opinion is concerned. Only in this circumstance can any question of the shipper's interest arise."

Continuing, the court discussed the choice between applying the package limitation or the alternative, which would be to ignore the container and count the contents.

"The accidents of notations on the bill of lading as to the package count is too uncertain to govern. Problems of proof would inhere and shippers inevitably would be tempted to minimize package size to increase potential compensation."

"More important is the question of insurance. Viewing the issue from the insurance vantage point, the choices between requiring the carrier to increase its coverage and pass on the costs of same to all shippers, even those who prefer cheaper rates and higher risks, and granting the option to the shipper to obtain that coverage he requires. COGSA, while pre-dating containers, did not pre-date marine insurance. The choice was before the Congress and, on examination of the terms of section 4(5), I conclude that the legislature opted for the second alternative."

The Court went on further stating that the record revealed the selection of the voyage and the vessel was made by the shipper, or its agent; that the shipper requested the use of the carrier's container, and that there was no undue involvement in the preliminary operations by the carrier in the loading, stowage, or handling of the cargo into the container. What distinguishes *Rosenbruch* from this case?

That decision is consistent with and follows the holding and pattern set by the Court of Appeals for this Circuit. In *Standard Electrica, S.S.* v. *Hamburg Sudamerikanische*, 375 F.2d 943, (2nd Cir. 1967) the Court said:

"In determining the meaning of 'package' we are without the aid of meaningful legislative history. . . ."

"Few if any in 1936 could have foreseen the change in the optimum size of shipping units that has arisen as a result of technological advances in the transportation industry. As both parties recognize it is now common for carriers to receive cargo from their shippers in a palletized form or 'containerized' form. In some instances an entire trailer may be uncoupled from its tractor-truck on the pier and placed aboard the carrier."

In *Standard Electrica* there was a shipment of 9 *pallets* of which some disappeared prior to delivery of the shipment to the consignee. The carrier argued that the pallet was a package and that the carrier's limitation of liability should be $500 per pallet. The plaintiff's principle contention was that a pallet was merely a mechanical device that is used in conjunction with a fork lift and other machinery in order to facilitate loading.

This Court in *Standard Electrica* set out a pertinent number of factors which, according to that Court, should be taken into consideration in the determination of what is a package. First, the characterization of the parties themselves. In that case the "dock receipt, the bill of lading and libellant's claim letter all indicate that the parties regarded each pallet as a package." The bill of lading described the number of pkgs. as "9", and after the loss was discovered the libellant sent a letter to the carrier complaining that only "2 packages were discharged" out of a "shipment of 9 packages." The Court decided that such characterizations are entitled to considerable weight in that the parties each had the same understanding as to what constitutes a "package" and reflected the meaning given that term by the custom and usage in the trade.

Secondly, it was the shipper, and not the carrier, who chose to make up the cartons into a pallet. Apparently for reasons of greater convenience and safety in handling.

A third factor is that the bill of lading specifically provided that the shipper at his option could obtain full coverage simply by declaring the nature and value of the goods in the bill of lading and, if necessary, by paying a higher tariff and thereby avoiding the package limitation.

In the matter now on appeal, the shipper requested the use of United States Lines' lift on, lift off tanks for the transportation of its commodity. It booked the transportation and space on board the PIONEER MOON for 24 tanks containing its latex shipment. The shipper, Firestone, picked up the 24 tanks from United States Lines' facilities filled the 24 tanks and returned them to the pier for loading on board the PIONEER MOON. 24 tanks were delivered to Shinko, the plaintiff, which in turn notified United States Lines and Firestone, both in its formal claim and in its letters of correspondence that 11 of the 24 tanks were empty of their contents. The bill of lading provided that the shipper could have declared the value of this commodity in each tank thereby avoiding the package limitation. But neither in *Standard Electrica* nor here did the cargo owner do so, and here as in *Standard Electrica,* liability should be limited to $500 per package.

The standard of what is a package, set in *Standard Electrica,* was clearly followed in *Nichimen* v. *M/V Farland,* 462 F.2d 319 (2d Cir. 1972). The United States Court of Appeals for the Second Circuit concluded that a large coil of steel was a package within the definition of Section 4(5) of COGSA stating:

> "While the description on the bill of lading is not controlling it is important evidence of the parties understanding"

citing *Standard Electrica* and continuing they discern a further purpose in the Statute namely to describe:

> "a unit that would be fairly uniform and predictable in size and one that would provide a common sense standard so that the parties would easily ascertain at the time of contract when additional coverage was needed, place the risk of loss on one or the other, and thus avoid the pains of litigation."

In concluding *Nichimen* v. *Farland* the Court of Appeals states:

> "The package provision in Section 4(5) has indeed become unsatisfactory as we have frequently noted, but pending a new resolution, courts do best to apply it in light of the parties probable intention. We have little doubt, in the light of the sales contract, the bill of lading, and common understanding that the parties here considered each coil, whether wrapped or unwrapped, to be a 'package'."

Some years ago Judge Swan in construing a similar USL bill of lading noted that the contract ". . . provided that the word 'package' shall include any piece or shipping unit." Later Judge Swan found "The parties have defined what 'package' means in the bill of lading." The court did not regard the $500 limitation for a yacht as a trap. *Pannell* v. *United States Lines,* 263 F.2d 497 (2nd Cir. 1959).

We again call attention to Judge Lumbard's opinion in *Sperry Rand Corp.* v. *Norddeutscher Lloyd,* (1973 A.M.C. 1392, not otherwise reported, S.D.N.Y. 1973) wherein the Court held a container 8 feet by 5 feet by six feet to be a package and limited liability to $500 citing *Standard Electrica,* supra and distinguishing *Leathers Best,* 451 F.2d 800 (2nd Cir. 1971). The Court applied the test of the parties characterization of the container as a package.

We respectfully submit that since the goods were not pumped directly into the vessel, the latex was not in bulk

and therefore *The Bill* is inapplicable. More applicable are the many cases of this Circuit and District which hold that the intent and characterization in the bill of lading, letters, etc., control and, as here, the parties have agreed the tank containers are packages.

(C) The *Kulmerland* decision and other matters

There is no Statute or international convention which defines a package under COGSA or excludes a "portable tank" from coming within the definition of a "package," under COGSA. What constitutes a package under COGSA is determined by the Courts.

Appellant makes the incorrect assertion that, because a piece of equipment is reusable and made of metal or durable material for the purpose of rep ated use, the USL lift on, lift off tank can in no way become a "package" under Section 1304 (5) of COGSA. But the principle function of containerization in ocean transportation is to move any type of cargo, general, specific, liquid, dry, etc., at the least expense to the shipper and the carrier and to reduce the exposure to risk of loss by reducing the number of times the cargo is handled. The rounded container tanks in this case are no different from the rectangular containers referred to in the many decisions holding such containers to be packages and subject to the $500 limitation.

Appellant refers to a treaty designed to prevent smuggling by the use of containers as being applicable here. This argument was made to the Court of Appeals in *Kulmerland,* 483 F.2d 645 (2nd Cir. 1973) by appellant's counsel and summarily dismissed by the Court. (see footnote 2, page 647).

The Customs Convention on the International Transport of Goods Under Cover of TIR Carnets (Vol. 20 U.S. Treaties and Other International Agreements, Part I, p. 185, et seq.), in spite of the detailed definition of a container "(lift-van, movable tank, or other similar structure)," has *no* relation to a package within the meaning of COGSA. It in no way affects, supports or dictates a definition of a COGSA "package".

The TIR Convention states as its "Scope," Article 2, page 188 that:

> "This convention shall apply to the transport of goods without immediate reoading across one or more frontiers between a Customs Office of departure of one contracting party and a Customs Office of destination of another contracting party, or of the same contracting party, in road vehicles or in containers carried on such vehicles, notwithstanding that such vehicles are carried on another means of transport for part of the journey between the offices of departure and destination."

The intent of the TIR Convention was to allow the free passage of cargo in sealed road vehicles or in *sealed* containers carried on such vehicles thus allowing the free movement of sealed vehicles or sealed containers between and through different nations from point of origin to point of destination.

If any international convention has any bearing on what constitutes a COGSA package, then it would be the Visby Amendments to the Hague Rules which has been anticipated by some of our Courts. These amendments formulated in 1968 wherein the world delegates, including United States, adhered to the proposition that the package limitation would be raised to $662. If the internal packages or units are enumerated in the bill of lading they would be the package. Where *not* enumerated then the container or similar article of transport is the package. No enumeration appears on the bill of lading in this case.

The *Kulmerland* decision does support appellee's position that the tank is the "functional package unit."

In *Royal Typewriter Co. etc.* v. *M. V. Kulmerland* (483 F.2d 645, 1973), the Court in applying its "functional economics test" asks . . . "whether the contents of the container could have feasibly been shipped overseas in the packages or cartons in which they were packed by the shipper."

The shipper had the choice of shipping in drums and USL container tanks or in bulk in the deep tanks of a vessel.

The "functional package unit" test propounded by the Court was:

> ". . . designed to provide in a case where the shipper has chosen the container a 'common sense test' under which all parties concerned can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary and then avoid the pains of litigation."

The shipper here chose the container and loaded his cargo into the transportation package. Common sense, as expressed by all the transportation and claim documents, indicate that the intent of the parties was to ship 24 *tanks*. The appellant should not be allowed to recover from the appellee more than $500.00 per tank because it was unable to allocate its responsibility for loss and then failed to purchase the additional insurance or declare the valuation of the cargo on the face of the bill of lading.

It is also to be noted that *Kulmerland* has put the burden of proof on a plaintiff to show that the container was not a package, since its goods could not have been shipped without USL container. The Court in placing this burden on the shipper (not the carrier) states:

> "Absent shipment in a functional packing unit, the burden is on the shipper to show by other evidence that his units are themselves packages." Only then does custom and usage in the trade, the parties' own characterization or treatment of the items being shipped in supporting documentation or otherwise, and any other factor bearing on the parties' intent become relevant, as in *Standard Electrica or Leather's Best.*"

In *Kulmerland,* the bill of lading for the container had typed under "number and kind of packages" one container said to contain machinery—here the bill of lading had typed the number of tanks under the same column and described the goods as latex. The container in *Kulmerland* was held to be a package under COGSA with a $500 limitation.

We submit the decided cases overwhelmingly, support the Court below in that the tanks are packages under COGSA and liability is limited to $500 per package.

POINT II

Appellant's arguments avoid the issue and are incorrect on the facts and law.

Appellant's arguments have been made to this Court in other case, e.g. the *Kulmerland,* supra and rejected by this Court. It is respectfully submitted that in Point I of this Brief, appellee has met appellant's arguments and explained the correctness of the decision below and the applicability of previous opinions of this Court.

However it may be noted that appellant in Point II of its brief argues that the shipment was in bulk—which it clearly was not—(see attachments "A" and "B") and then shifts to argue that the tank, which is a drum, is functionally a part of the ship, which it clearly was not. Then appellant cites *Leathers Best* v. *Mormaclynx,* supra,

which involved a container provided by the carrier for its convenience. The ocean carrier in *Mormaclynx* had its agent present to receive and receipt for 99 bales of leather just as it would have in a break bulk shipment i.e. if the 99 bales had been received alongside its vessel and loaded into a hatch. Here, as in *Kulmerland,* supra, *Sperry Rand,* supra, *Standard Electrica,* supra and other case, the carrier did *not* receive and receipt for the cargo as it would have any non-containerized shipment and as did the *Mormaclynx.*

As Judge Friendly stated at page 816 of the *Mormaclynx* decision:

> "If Mooremac had said simply that liability before loading or after discharge would be limited to $500 per container unless a higher valuation were declared and a higher rate paid, such a stipulation would have effectively limited its liability for the loss that here occurred. The Ansaldo San Giorgio I v. Rheinstrom Bros. Co., 294 U.S. 494, 496-497, 55 S.Ct. 483, 79 L.Ed. 1016 (1935)."

What troubled the Court of Appeals is that the limitation in *Mormaclynx* was for the period after tackle. That problem is not present in this case since the loss occurred on the voyage, clearly within the COGSA period.

Leathers Best may have been applicable if appellant had delivered its tanks or its drums to the appellee and then appellee placed the tanks or drums into a container. It may be noted that even in that situation the freight would have been computed in the same manner.

Appellant also totally ignores the parties characterization guidelines of *Standard Electrica, supra.*

Finally, appellant is aggrieved because it did not declare a value and thus escape a limitation of liability. But this is the basis of Judicial, International, Congressional and Administrative regulation of such limitation. And it is exactly what a sophisticated and knowledgeable shipper, Firestone, contracted to do. Moreover, no question is begged because if the tanks were not packages, a declaration of value would be necessary to escape the limitation of the "customary freight unit".

Based on the appellant's own descriptions, characterization and treatment of the tanks, and that the tanks were not a part of the vessel and the holding of this Court and the Judges of the District Courts, clearly loss or damage to the contents of the tanks in question is limited to $500 per tank in accordance with COGSA and the bill of lading contract.

CONCLUSION

The judgment of the District Court limiting liability to $500 per tank should be affirmed.

Respectfully submitted,

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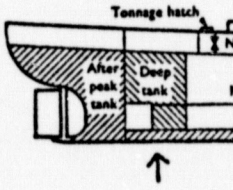
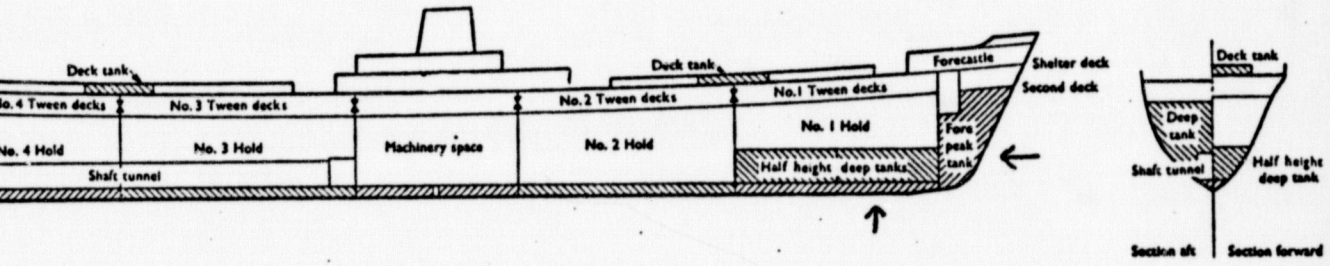
One of several types of portable containers used by U.S. Lines in its container service. Unit shown is seven feet and seven inches in diameter and nearly seven feet high. It is the type referred to in the case.

Appendix A

Appendix B

(See Opposite) ☞





Example of a ship's profile illustrating decks, spaces and deep tanks.
[not a profile of PIONEER MOON, an example of tank space of a ship only]